

CHAPTER 2 - POLITICAL CULTURE 1

CONSTITUTIONAL PRINCIPLES

PRESENTATION BY PROF CHRISTINE BARBOUR

(**Abstract:** Core American values: Locke and the enlightenment, consent of the governed, the balance between power and liberty, Federalism)

10 PROF. BARBOUR: What appears in the South African newspapers about the United States must present a strange picture. You hear a lot about the Iraq war, and American Imperialism appears many times. You've seen footage of a recent hurricane or two in the United States and a lot of criticism of the United States Government's handling of it – like the lack of Federal response. This is a really hard vision of America, for a country that prides itself on being such a great democracy.

If you go back a little further, you saw Presidential elections where the person who is now the President of the United States, didn't win a majority of the popular vote.¹ Again for a country that touts itself as a democracy, how can this be? These images must present a really odd picture of what American governance is all about.

20 If there's one thing that I can tell you about American politics, it's that we have some pretty amazing constitutional principles that underline our political system. We don't always exercise those principles perfectly. In fact there are times when we exercise them imperfectly.

We had an incredible opportunity in the last month to have an interview with the Secretary of the State of the United States, Condoleeza Rice, and I was asking her about patriotism and citizenship and what they mean to her. I said, okay, so you're the Secretary of the State of the United States but you grew up as a black girl where you were essentially in the American version of apartheid and now you serve the United States, how do you reconcile that? She answered that "Patriotism doesn't mean that my country's right or wrong." She said, "Part of my country was wrong, it's a human institution, it makes mistakes and my country has made some huge mistakes. But it has principles and it is the struggle for those principles that defines for me what America is and it's the allegiance to those principles that I think of as patriotism."

30 I was really touched by that answer. It's not exactly what I expected. Today I have an hour and a half to tell you what those principles are. I want to give you a sense of what it is that makes Americans, even Americans who had that kind of an experience in their youth, still say that they are patriotic and that they really think this is a wonderful political system.

I want to start by talking about the context in which our country was founded. I'm going to divide my talk into two parts; one part is going to be about the context in which the American founders were coming up with their ideas about government, the other part is going to focus on the main principles of the government that they came up with.

40 Our founders wrote our constitution at the time of the European Enlightenment. They were reading people like John Locke, and I don't think you

¹ Election 2000, in which George Bush defeated Al Gore.

can overestimate the impact that he had on the way the founders of the US system thought. Locke was writing at a time when ideas about politics were changing dramatically. Ideas about who should rule are kind of shrouded in - not quite mysticism - but mystery certainly. Traditionalists of the day believed in the idea of a divine right, that the person who rules on earth was put here by the hand of God and so you don't want to disobey that person because if you disobey that person, you disobey God.

Well, that's a big sanction! It's one thing to have a little treason and it's another thing to send yourself to eternal damnation. The Enlightenment pitted this
10 belief in the divine right of kings against Locke's belief that there was a different basis for government. Locke wrote that in a natural state, human beings are alike; they are given by nature or by God something like an inherent set of rights. And when humans come together to form a government they do it because life in a state of nature is pretty inconvenient. It's inconvenient when you rob me, it's inconvenient for me when you push me around. So I'll join with other people and agree to form a contract by which I give up some of my inherent rights in exchange for a government that protects all the rest of my rights. Government is by consent of the governed. This is a far cry from the divine right of kings and it's a far cry from the operating principles of George III.

Consent of the governed is a pretty convenient principle. If you're going to
20 have a revolution, it's nice to have a founding principle like this one that says if government stops protecting your rights, it's okay for you to have a revolution and start another government. Thomas Jefferson used Locke's words in the Declaration of Independence. The words "life, liberty and pursuit of property" would have appeared in our Declaration of Independence, except that the document was directed to poor people as well as rich people, so it says "life, liberty and the pursuit of happiness."

Consent of the governed is a contractual idea about government that, if you think about it, limits government. This philosophy provides for only as much
30 government as is necessary to preserve our freedom: that's what government is for. This is a literally revolutionary idea about government. And this is an idea about government that is not seen anywhere else at this time.

"Government, even in its best state is but a necessary evil; in its worst state, an intolerable one."

Thomas Paine

For our founding fathers, this philosophy was a major change. What they were creating was a new kind of government, a limited government that maximises
40 individual liberty. Constitutional principles are all about the balance between power and liberty, and that's how you have to understand the very unusual mechanism of American politics, trying to balance power and liberty.

Putting Locke's ideas into practice was difficult. John Locke actually wrote constitutions for North and South Carolina; constitutions that were really detailed. But for the founders, writing these ideas into a document was difficult. After the war for independence, the founders needed to do just that.

The government first formed was a very weak one, in which the states were bound together by the “Articles of Confederation,” which created a loose league of friendship among the American States. Thirteen original states could each do pretty much do what they wanted, subject to very limited central powers. The national government had enough powers to take care of minor functions, but it could not regulate commerce between those thirteen states or even coin a single currency. This was a governing philosophy chosen by people who thought that big governments were likely to get corrupt, so they wanted to keep the national power limited.

10 During the period of the Articles of Confederation, hard times occurred. These were times of enormous economic deprivation, there were crop failures, there were droughts, there were all kinds of problems. With hard times, farmers became indebted and had borrowed lots of money and so were in big financial trouble. Because so much power was vested at the State level, the farmers were able to change the rules, making contracts non-binding and forgiving debts owed by farmers. Generally, farmers did really well under the Articles of Confederation and as you can imagine the people who were doing all the money lending were doing really badly under the Articles of Confederation.

20 The Articles of Confederation really didn’t work out very well for some of the founders: for James Madison and Alexander Hamilton and others. So they set out to construct another kind of government, one that wasn't going to have the weakness of the Articles of Confederation. One that would hold together at the center a little bit more and to do that they came up with a set of principles that for all the flaws of American government endures still today and that still today I think show absolute genius in thinking about how these things work.

The Founders really had to answer three main questions: first, how much power should the State have; second, how much democracy should there be; and third, how do you limit government power?

30 How much power should the state have? The Founders answered the first question, “how much power should the State have and how much power should the national government have” with a new perspective on how to arrange local and national governmental units. Keep in mind that in England, at the time, government was quite centralized. So what the founders came up with was a compromise; one that today exists in Germany, Canada, and lots of places in the world – anyplace that has a federal system. But Federalism is a creation of the American system. Federalism allows for substantial central powers, but reserves many powers for the States and conveys to the States their own areas of responsibility. There are things the States can do that are not the federal government's business and there are things the federal government can do that are

40 not the States business.

Under this arrangement, State governments cannot get rid of the national government and the national government cannot get rid of the State governments. Once, years ago, Margaret Thatcher – who was a Conservative Prime Minister of England – didn’t like something that the Labor Party did. She just dissolved Parliament. Needless to say, you don't do that in the federal system. If the leader of the House of Representatives in the US Congress gets mad at our Alabama, he

doesn't say "goodbye Alabama, I dissolve you." The States are there and they have their own centers of power.

Federalism gives states distinct areas of responsibility, but nobody can draw a sharp line between national and State governments. The history of American politics and contemporary American politics is a struggle between national and State governments. The response to Hurricane Katrina centers on this issue; whose job was it lead the recovery after Hurricane Katrina? Certainly it is the local government's responsibility to take care of its citizens and watch out for their welfare. The U.S. Constitution says the States are supposed to look out for the health and welfare of their citizens. When those local respondents are overwhelmed, the national government is supposed to kick in even those who believe that government should be absolutely minimal tend to believe there's still a role for the government to respond in a national disaster.

Katrina brought out ongoing, honest American debates about whose job relief was. Our constitution contains what we call "the supremacy clause" which resolves conflicts between State and national law, by saying that national law will always win. Another part of our constitution contains the "necessary and proper clause" giving Congress whatever power is necessary to carry out its duties. Well that seems like a pretty broad granted power. But on the other hand, our tenth amendment says that any power not given to the national government is reserved to the State.

Over time, the battle between State and national authority has swung from one side to another. During the "Great Depression" and the "New Deal" era, President Franklin Roosevelt spurred all levels of government to grow to get the country back on its feet. Local governments grew, State governments grew and the Federal Government just exploded. People got used to Federal Government's involvement in social security programs, getting people back to work, even building large portions of Indiana University, through its Works Project Administration.

As government took on a bigger and more active role, people got used to it and up until the 1980's or so, there was a big tip in the balance of power toward a stronger national government. The Civil Rights Movement gave the national government even more power after the 14th amendment of our constitution was interpreted as a mandate to end discrimination. In the 1980's, what we call devolution or diminishment of national government's role began. And that's where we are now; in a point of devolution where no one's exactly sure where to draw the line of power. You can't understand American politics if you don't understand Federalism and Federalism isn't a fixed target.

How much democracy should there be? The answer to this second question suggests that the Founders really weren't all that enamoured with democracy. These men all came from colonies that severely restricted the vote. You couldn't vote unless you belonged to a certain church; you couldn't vote unless you had a certain amount of property; you couldn't vote unless you were male; you couldn't vote unless you were white; you couldn't vote unless you were free. On the other hand, they did believe in John Locke's view of government by consent. They believed in some role for the people. They just weren't exactly sure what that role

was going to be.

From some of what they've written, we can piece together what they had in mind as they constructed this government that we should call a republic. A republic did not involve all citizens making decisions about all the things that happened to them. For Madison a republic was best suited to be run by elected representatives. Madison believed in a fairly restricted, limited government done by the mechanism of representation.

"A pure democracy is a society consisting of a small number of citizens, who assemble and administer the government in person."

James Madison

The Founders struggled with the question of who was going to be represented in this new government? Under the Articles of Confederation, representation was by State and every State got one vote in the legislature. Small States thought this was a great idea. Tiny States having the same amount of votes in the legislature as big States seemed a wonderful thing. Big States of course thought that representation should be based on something that the big States had more of, like people or taxes paid.

The big States wanted a legislature where there would be two chambers, not one, and in both of them representation would be based on population. That "big State" plan was named after one of the big States, Virginia. It's called the Virginia Plan. And that "little State" plan was named after a small State, New Jersey. The answer the Founders came up with is a fascinating one and again it's a peculiarly American answer. By compromising between the Virginia plan and the New Jersey plan, we ended up with two chambers, the Senate and the House of Representatives. In the Senate, all the States are equal. Every state gets two Senators, period. In California, for example, a state that takes up the whole west coast of the country, you still get two senators. Or, you can be little tiny state like Rhode Island, and still get two senators. This creates equality among states in the Senate.

In the House of Representatives, representation is based on population, so California has many more representatives, called "Members of the House." There are 435 Members of the House, plus 100 members of the Senate, for our 50 States. The Founders strongly believed that popular opinion would be represented in the House and State interests would be represented in the Senate.

Principally, Madison advocated indirect democracy through representatives and that people would inevitably be divided by their economic interests. Madison believed that most dairy farmers would get together with other dairy farmers and ranchers would get together with other ranchers. People would all have interests that would force them to organise and try to influence government to get their way. People are naturally like that, he thought; they're naturally self-interested and naturally would organise into groups that Madison called the interest groups, or factions. There would be so many of these groups, he thought, that they would play against each other and balance each other, leaving no one group supreme. This turned out to be insightful and you see this balancing even today in American

politics.

Sometimes our country looks like a big kaleidoscope of chaos with so many different voices. But individuals belong to those groups, which are another way of giving people power, another way of being democratic. Even though the group is not individual, it contains a lot of individual ideas.

After the constitution was drafted, and before it could become the law of the land, it had to be ratified, or signed by a two-thirds majority (nine) of the States. Nine of the thirteen States had to agree to this constitution, including those who had preferred the Articles of Confederation, the “small State” people, the people
10 who hoped that government capacity could be kept limited. These hold outs wanted some protection for individuals from a powerful government, so they insisted on a Bill of Rights that would outline exactly what the government is not allowed to do. The first ten amendments to the U.S. constitution are called the Bill of Rights.

Of importance is that the Bill of Rights does not so much convey individual rights as provide limitations on the power of the Federal Government. This goes back to that belief in limited government. We were and still are so worried about big government that we have put the Bill of Rights prominently to tell the government where it cannot act. The tenth amendment, for example, holds that
20 powers not expressly given to the Federal Government are reserved to the States.

Our rights as Americans are different from the rights of, for instance, South Africans. We don't think about rights to have jobs, to have shelter, to have food or to have medical care, like many countries do. We think of our rights as the things government cannot do to us. Granting the right to health care or the right to shelter, we feel, would just make government bigger. This distrust of government is equally true of both Democrats and Republicans.

In terms of our political difference, what is interesting is that we Americans are not that different on many issues. Democrats are more likely to believe in a national health care program than Republicans are, but nobody in the United States
30 has ever proposed a seriously socialised health care system like they would have in Great Britain for instance or in Canada or in Germany. Again, it is not really on our menu because of our worry about government.

How do we limit government? The third question before the Founders suggests the fear they had of putting themselves right back where they were as subjects in Great Britain's colonies. The answer they came up with was separation of powers and checks and balances. These widely read really smart Founders of American politics didn't just read John Locke, they also read Montesquieu, a French philosopher who advocated limited powers of government. Montesquieu believed that combining all of the administrative and legislative functions of
40 government in the same place, whether that means the same person or the same body of people and that person turns out to be corrupt, you can quickly end up with tyranny. So, divide power up, he said. Have a legislature, have an executive, have a judiciary. Don't be like England and have it all in the same place. Remember, Locke also advocated limitations on power. The Founders believed that the more liberty is preserved, the smaller the government is.

Sometimes people are confused when they look at the American Government

because it seems as if it can do so much. And yet even “big D” Democrats² and “big R” Republicans accept the philosophy that limited government is essential. While the “big D” Democrats today tend to favor a larger role in society for government, even they are not in favor of expanded government roles you often see in other countries with unlimited governments.

The Founders constructed a system that separated the powers and then they made each of those branches of government a little bit responsible for what went on in all the other branches of government. They caused each of those powers to “check” the other ones.

10 The “Federalist Papers” are a collection of 84 newspaper editorials written by the Founders to help explain the system of government being contemplated and to build support for ratification. Madison and Hamilton wrote many of them, including one of the most famous, Federalist No. 10, which is where Madison explained the whole theory of factions. My favourite is Federalist No. 51, which is also written by Madison, in which he explains that if men were angels, we wouldn’t need to have government. He said, we have governments in place because we’re not angelic, we are self-interested. In this, Madison’s view of human nature was not the traditional republican virtue model where human beings could be counted on to sacrifice their own self-interest.

20 Given all the problems they had with the Articles of Confederation, Madison became sure that we weren’t angels. And the Enlightenment’s focus on being able to shape the world helped the Founders design a government that would recognize that human nature is ambitious and self-interested. Madison believed in ‘a republican remedy’, for “those diseases that are most incident to republican governments.” Madison advocated the creation of a government that would take use human nature, flawed as it is, to create good government by separating the branches and make it in the interest of the people in each branch to be watching their backs, to be looking over their shoulders, to be suspicious.

30 Under our system, the President executes the laws but cannot legislate; that is done by the Congress. The President, though, can veto acts passed by Congress. If a sufficient majority can be gained in the Congress, they can override the President’s veto. Congress’s writ is also circumscribed. Our Supreme Court can declare laws unconstitutional. But that doesn’t give the Supreme Court all the power because Congress gets to confirm members to the Supreme Court, so they have some say on who is on that court. Every branch, therefore, has some power over the other branches.

Jealousy and self –interest, as Madison believed, would cause all branches to keep each other honest because they won’t want to let any part of this other government get away with anything.

40 This amazing system contains the power of the Federal Government which means, of course, that when something like Hurricane Katrina happens, there are lots of places to point fingers. You can blame the local government, you can blame the State government, and you can blame the Federal Government. In Congress, the Democrats quickly attacked President Bush and the Federal

² “Big D Democrats” and “big R Republicans” are names of political parties, not political science terminology.

Emergency Management Agency, FEMA, which is part of the Federal Government. But, since members of the Senate had confirmed the head of FEMA, they were all a little bit responsible for this. Finger pointing is really hard in a government that's as complex as ours.

From time to time people complain of “gridlock” in the American Government; that nothing can really get done very quickly because before any Bill can become a Law, it has to get passed by the House, by the Senate, and it has to be signed by the President. Then, if it has constitutional implications, it can be overturned by the Supreme Court.

10 That makes it tough to pass legislation. But the founders wanted it that way. They wanted government to be slow and painstaking. While the early debates were being held about whether to have a single tiered legislature or a two-tiered legislature, one of the Founders explained it this way: “You know how when you're drinking tea and it's too hot and you want to pour it into your saucer to cool it off? He said, “that's why we have two houses, to cool off the tea, to cool down tempers by dividing them up and making legislation be passed by both houses.”

Reflection by Prof Abdul Lamin (WITS)

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PROF LAMIN: Professor Barbour's outline of American constitutional democracy raises questions of how this fits with what Africa is trying to be.

First of all, it is important to underscore that Africa's post-colonial experience was influenced by colonial rule and how this rule varied from one country to the other. For instance, British colonial rule emphasized the system of indirect rule through traditional institutions. Even though those institutions were not completely uprooted, they had only limited autonomy. The French system of assimilation, by contrast, was designed to create a broader, wider French empire containing colonialist citizens as part of the empire.

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Professor Barbour also focused on how America's “founding fathers” struggled in defining the relationship between the Federal and state governments. In the immediate post-independence period in Africa, starting in the late 1950's and early 60's, the principal challenge was to devise a constitutional system which could incorporate traditional aspects, norms and values of African social and cultural life into modern constitutions. Unfortunately, because most of the negotiations were conducted between a selected few and the colonial authorities, there was really no attempt to incorporate those traditional institutions into modern systems of governance.

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So the challenge for Africa as it came out of the colonial experience was to identify between systems of government: was the Westminster system relevant for a post-independent Ghana?

On independence a disconnect emerged in Africa between the imperative of identifying a system of governance that was representative of the vast majority of the population, including of course traditional institutions of governance, and the imperative coming from colonial experience of forging governments out of colonialists cloth.

It is also important to reflect on post-cold war institutions. With the end of communism, the fall of the Berlin wall, etc. there was a wave of democratization inspired by economic global regimes. The ideological rivalry that had inspired more than 50 years of super powers and constitutions was over. The democratic wave prevailed and brought about a lot of optimism in Africa. Countless countries embarked on the project of democratization and constitutional rule.

What also emerged, though, were some real challenges, particularly the political violence that the continent experienced, from hostilities in Luanda to the situation in Somalia and the break up of states such as Sierra Leone and Liberia.

10 Overall, Africa's experience represents a picture of some light at the end of the tunnel but a picture that was balanced by real challenges of trying to bring peace and stability in the continent.

Question and answer session

QUESTION: In the balance between local and national government entities in the U.S., who wins out? For example, in New Orleans the local government tried to get the Federal government to help protect their barrier islands from oil companies who make channels through them. This was part of the reason why New Orleans was so vulnerable to hurricane Katrina.

20 PROF BARBOUR: Madison argued that interest groups somehow would balance each other out. When I teach interest group politics, I point out that there are some things that make some interest groups more powerful than others. The biggest is money. Multinational oil corporations have lots of money and they have ways to get their message across to Democrats and Republicans alike.

Environmentalists have a tough problem. That is, it's hard to get people to sign on to the environmental cause when they are going to benefit from cleaner air or cleaner water or better levees in New Orleans, whether they join or not. Environmental groups tend to be under-funded compared to the big multinational corporations. I think Madison was a little naïve when he thought that there would be this balance among these different groups. I think that the responsibility is on

30 citizens to organize.

Citizens, at least in the United States, tend to be apathetic. One of the books in the libraries you will receive is an American politics text book called "Keeping the Republic."³ The title of the book comes from a story about Benjamin Franklin who while writing the constitution was asked, "What have you created?" and he said, "A republic Madam, if you can keep it". The tendency, today, for Americans is to be a little complacent about democracy and to be a little complacent about doing the job of keeping the republic. There's nothing inevitable about democracy, there's absolutely nothing that says that the government we have today will be here

40 tomorrow. You can put all the checks and balances into place that you want but one other part of the equation has to be present. That is, the citizens. Without that "citizen check," you do have abuses of power and you do have imbalances of power.

³ Barbour and Wright

In writing the book, we interviewed Condoleeza Rice, and other public officials of all stripes and all persuasions in all different kinds of jobs. I asked them “why do you serve the public,” “what drives you to keep the republic” and “what would you tell our students to do to keep the republic”? We got all kinds of answers, but every single one of them said that democracy is not self-sustaining, you've got to do the legwork, you've got to put in your time, you've got to do more than just vote. You've got to read newspapers, you've got to think critically, you've got to pay attention, you've got to hold people accountable, you've got to vote them out when they don't do what they said they're going to do. You've got to vote them out when they lie, you've got to really pay attention. I'd like to say we do a better job but we don't really do a great job of that right now.

QUESTION: Do African states have the political systems in place to limit the accumulation of power?

PROF LAMIN: Many African states do not have the institutional capabilities that are in place in the United States; institutions that will limit the kind of powers that we see exhibited by multinational corporations and so on. But the larger question is, is it democracy first or is it development first, or is there a common ground? There's a lot of talk, for instance, about the “Asian Tigers” – countries such as Malaysia, Singapore, and how they were able to get themselves out of the kind of state that they found themselves in 40-50 years ago. In fact, many of the regimes that presided over the kind of economic transformation that we've seen in that part of the world were not democratic in many respects.

I talked about the linkages between good governance, peace and security and development. Look at a country such as Ghana for instance which has been showcased by the international community, and specifically by international financial institutions such as the World Bank. There is a fundamental contradiction in that kind of progress because Ghana was able to succeed with for the most part a [non-democratic] regime.

QUESTION: How can you say the Supreme Court represents “checks and balances” when the court tends to follow the political party in its decisions. Doesn't the decision just depend on which party appointed the judge?

PROF BARBOUR: You can actually undo checks and balances and the separation of powers, at least temporarily, if you have a majority in both the House and the Senate of the same party as the President. If you also have a majority of people in Supreme Court appointed by the same party, then you can have something that looks an awful lot like a parliamentary system, which is of course the opposite of separation of powers. We don't often have that but we have it right now in the unusual circumstances that the Supreme Court actually settled a presidential election, which made it even look stranger.⁴ This is not a system that always works perfectly.

But, in answer to your question, many people who were appointed to the Supreme Court change dramatically when they're on the court; they're not in lock-step with the party or person that appointed them. The biggest impact that the court has had in my lifetime was the year I was born, when Brown vs. Board of

⁴ A reference to the Supreme Court's ruling in the 2000 Presidential election.

Education was decided.⁵ Brown vs. Board of Education was the case where Supreme Court decided that segregation in public schools was unconstitutional. The court undid segregation with that single court case. And the person who was the Chief Justice at the time was Earl Warren, who had been appointed by a Republican, President Dwight Eisenhower. Eisenhower called this appointment “the biggest damn fool mistake I’ve ever made.” But he made it. And it just shows that people do change dramatically.

We're having confirmation hearings right now, for the replacement for Chief Justice William Rehnquist, who recently died. And right after that we're going to have hearings to replace Sandra Day O'Connor, who will retire. The man who's
10 going to be confirmed as our next Chief Justice is a man named John Roberts, who has been extraordinarily cagey in how he answers questions. And what both sides wanted to know is, “What are you going to do when you have to deal with abortion?” and “What are you going to do when you have to deal with civil rights?” It's politically smart of him to not give anything away, because that way everybody thinks he'll be on their side. We don't know exactly where he's going to be, but most people, Democrats and Republicans alike think he's an independent thinker.

I think Roberts will make decisions on their merits. Will the decisions be
20 likely to be more conservative? Sure. You can't expect Bush to appoint anybody other than a conservative. But he's not likely to be as conservative as some other members of the court. There will be a conservative tilt on the court until the American people elect a Democrat and that Democrat gets to appoint some Supreme Court Justices and push the tilt back a little bit in the other direction.

PROF LAMIN: From my point of view, Africa has the disadvantage of not having the institutional frameworks that Professor Barbour here refers to. I think for democracy to be meaningful it must deliver, so there is an economic dimension to that.

BARBOUR: It's an excellent point and of course everybody believes in
30 effective government, a strong government and most people believe that an effective Supreme Court is an essential element of this, until of course the Supreme Court rules the wrong way. And some people also would argue that effective government is exactly what America was designed *not to* produce, because effective government is actually potentially despotism.

QUESTION: I have two questions relating to supremacy of the constitution. How can you reconcile supremacy of the constitution when state governments can make their own constitutions even to the point of deciding issues like the right to life, the death penalty, etc. And if you want to have a representative democracy, how representative is it then when the electoral system is then overridden by the
40 rule of the Supreme Court?

PROF BARBOUR: As for the right to life, we don't have any right to life in the constitution; it's absolutely silent on that, so there's no disjuncture there. As far as reconciling the supremacy of the constitution with state's rights goes, though, there are places where the states act and the Federal government can't.

⁵ 1954, Brown vs. Board of Education of Topeka.

States can have the death penalty or not have the death penalty and it's the state's choice. But if there were a constitutional amendment that established a right to life, the states would no longer be able to have a death penalty. That is what is meant by supremacy of the constitution. Likewise, if the Supreme Court interprets some part of the current constitution to rule that the death penalty is unconstitutional, then state laws would have to change. That has happened a couple of times, not that the death penalty per-se was unconstitutional, but what the Supreme Court has said is, the how death penalty is implemented is unconstitutional. If you're going to do it, you have to do it in a certain way.

10 The hardest thing to understand is that our constitution is so limited. It's very short and there are lots of things that it's silent on. And the things where it's silent are places where the states are supreme. States can do all kinds of things. The state of Oregon has a law that allows you to vote by mail. As a result, people vote in Oregon in great numbers, because they don't have to vote only on Tuesday when they can get off from work or after they've stood in line. The constitution says that the manner in which election is held will be reserved to the states.

20 COMMENT: Many of the national constitutions of African states clearly spell out numerous civil liberties and rights. South Africa for instance, has one of the most liberal constitutions in the world, containing rights to housing, employment, and so forth. How do you move from the expression of ideals to achieving specific goals and objectives? If democracies are going to be effective, then they must be able to deliver. And if they don't deliver then there is a real danger of disintegration into political turmoil.

"That Government is best that governs least"
Thomas Jefferson